

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NO. 92-223
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MICHAEL DENT :

MEMORANDUM

R.F. KELLY, J.

AUGUST 12, 1997

Shortly before the date set for the sentencing of Michael Dent, his attorney filed objections to the presentence report. Because there was not sufficient time for the court or opposing counsel to deal with the objections, the court continued the date of sentencing to August 22, 1997. The purpose of this memorandum is to deal with the objections that have been filed.

1. Relates to paragraph 4 of the presentence report which is not opposed by the United States Attorney and it is Granted.

2. Relates to paragraph 10 of the presentence report and objects to the figure of 10.85 grams because it includes amounts of cocaine salt and base and includes materials taken from the person of Courtney Golden which Defendant contends were not foreseeable to Mr. Dent. The Assistant United States Attorney does not oppose this because it would leave an amount of 8.119 grams and it would therefore not change the sentencing guidelines.

Although I believe the circumstances surrounding Courtney Golden's arrest and the arrest of the other defendants in the house to which Courtney Golden fled upon seeing the police would support the inclusion of Courtney Golden's drugs in the Defendant's

sentencing determination, I will accept the government's position in using figure 8.119 grams for sentencing guidelines purposes.

The Defendant also argues that the government has failed to establish by a preponderance of the evidence that the 8.119 grams was in fact cocaine-base ("crack"). Although I think there is sufficient evidence in the records from which I could find that the 8.119 grams was cocaine-base ("crack") out of an abundance of caution, I am requesting that the Assistant United States Attorney produce the chemist who testified at trial for the purpose of testifying whether or not the cocaine-base was in fact crack cocaine. This may be done at the sentencing hearing scheduled for August 22, 1997 or prior thereto at the convenience of the parties.

The Defendant also objects that the weight of the substance was obtained by averaging the weights of the vials and projecting the weights of only a small number of samples tested. The testimony was that the chemist analyzed and weighed only the contents of four seventeen vials from Item 3, and only eleven of 115 vials from Item 5. N.T. 2/4/97 at 20-26. I find that the method used by the chemist in determining the total weight was valid and that may be used in determining the Defendant's sentence under the sentencing guidelines.

3. Defendant contends that paragraph 15 of the presentence report should reflect a base offense level of 12. This objection will be disposed of after hearing further testimony referred to in paragraph 2 above.

4. This objection pertains to paragraph 16 of the

presentence report and takes exception to a two point enhancement because of the firearms carried by Derrick Kelly. This objection is sustained and the two point enhancement should not be applied.

5. Defendant objects to paragraph 18 of the presentence report contending that he is entitled to a two point downward adjustment for having played a minor role in the offense. Under USSG 3B1.2(b) application note 2 states:

It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

I find that under the facts of this case Mr. Dent does not fit the requirements for a two-level downward departure as a minor participant.

6. Pertains to Defendant's exceptions to paragraph 20, 22, 24 of the presentence report with respect to references to adjusted and total offense levels. This will be determined by the court after a decision is made with respect to the hearing referred in paragraph 2 above.

7. Defendant objects to paragraph 29, 30, 31 and 32 of the presentence report on the basis that the offenses cited in those paragraphs are related and lead to the calculation of a criminal history category which overstates the seriousness of his criminal history. The application notes to the sentencing guidelines provide that when a defendant's criminal history is

calculated, prior sentences for offenses which are separated by an intervening arrest are not considered related. USSG § 4A1.2, comment.(n3). The presentence report reveals that the four separate convictions set forth in paragraph 29, 30, 31 and 32 were all separated by intervening arrests. The presentence report has properly calculated Defendant's criminal history to be a IV under § 4A1.2 of the sentencing guidelines.

8. Defendant objects to paragraph 55 of the presentence report which sets forth the term of imprisonment and Count 1. The determination of this objection will depend upon the decision on paragraph 2 above.

9. This is an objection to paragraph 56 of the presentence report which sets forth the guideline range for the present offenses. This determination will be made at the time of the decision on paragraph 2 above.

Robert F. Kelly,

J.